Supreme Court, U.S.
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No. 94 140

In The Supreme Court of the United States

October Term, 1994

AMIR PORAT,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Petitioner's Fifth and Sixth Amendment Rights to due process, confrontation, and jury trial violated where an essential element of the offense materiality, was not submitted to the jury violating In Re Winship and it's progeny?

2. Was Petitioner's Fifth and Sixth Amendment rights violated where the government failed to prove the essential element, materiality, beyond a reasonable doubt?

3. Did the district court act within the time honored inherent, historical, and statutory broad discretion in sentencing Petitioner to serve the home detention portion of his sentence in Israel?

4. Was Petitioner denied a fair trial when irrelevant overly prejudicial and unreliable hearsay "other crimes" evidence in the nature of antitrust violations was admitted and where Petitioner was denied the opportunity to prove his good character in violation of Michelson v. United States?

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OPINIONS BELOW

On March 3, 1994 the U.S. Court of Appeals for the Third Circuit filed an opinion, which is reproduced in Appendix A, infra, pages A1-A22, affirming the judgment of conviction, entered by the U.S. District Court for the Eastern District of Pennsylvania, however, vacated that part of the sentence which permitted Petitioner to serve the five months home detention in Israel and remanded for resentencing to provide that the home detention be served in the U.S. On April 14, 1994 the Third Circuit denied Petitioner's Petition for Rehearing, Appendix A, infra, A23 - A24.

On January 19, 1993 the Honorable Norma L. Shapiro, sentenced Petitioner to a split sentence, 5 months incarceration in the U.S. and 5 months home detention in Israel. On January 5, 1993, Judge Shapiro had filed an opinion and order denying post trial motions, and which is reproduced in Appendix A, infra, pages A 25 - A 54. A copy of the judgment and commitment order is reproduced as Appendix A, infra, pages A55 - A56.

JURISDICTION

The opinion and order of the U.S. Court of

Appeals for the Third Circuit (Appendix A, infra A1-A21) affirming the judgment of conviction but vacating the home detention aspect of the sentence, was finally entered on April 14, 1994 after the Petition for Rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> .... the accused shall enjoy the right to a speedy and public trial, by an impartial jury....; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

18 §1623. False declarations before grand jury or court:

> (a) however, under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . .

STATEMENT OF THE CASE

On March 3, 1992, Amir Porat, an Israeli citizen, prosecuted by the Antitrust Division of the U.S. Department of Justice, was indicted by a federal grand jury sitting in the Eastern District of Pennsylvania charging him in two counts with making a false statement to a grand jury on May 17, 1989, in violation of 18 U.S.C. 1623.

The indictment alleges that the government was then investigating alleged antitrust violations, specifically, whether Amir Porat and his company I.M., Inc. ("I.M.") had engaged with Fraass Survival Systems, Inc. ("Fraass") in bidrigging on U.S. military bandage contracts between 1983-1986 on bids submitted to the Defense Personnel Support Center of the Defense Logistics Agency of the Department of Defense (DPSC) in Philadelphia, Pennsylvania.

The indictment charged that it was material to the grand jury's investigation to determine Amir Porat's relationship with Fraass during the aforementioned time period, 1983-86, in which Fraass and I.M.Inc., submitted bids against each other on the aforesaid

military bandage contracts.

Count One charged it was material to the grand jury to determine whether Amir Porat received a certain $200,000 check issued by Fraass to Credit Suisse on or about December 19, 1984. Count two charged it was material to the grand jury to determine if Porat had a bank account in Switzerland. The government alleged he denied falsely receiving the specified check and having a bank account in Switzerland.

In May 1992, Amir Porat was arrested, admitted to bail, and permitted to travel between Israel and the United States pending trial.

A jury trial was held from October 20 to October 26, 1992. The jury deliberated over two days, before reaching a verdict of guilty on count two. The jury was hung on count one and the district court ordered a mistrial as to that count. Post trial motions were denied on December 4, 1992.

On January 19, 1993, Mr. Porat was sentenced, inter alia, to the custody of the Attorney General for five (5) months and to home confinement in Israel for five (5) months (judgment entered on January 20, 1993).

Mr. Porat timely filed a notice of appeal, and on February 2, 1993 the court held a hearing and permitted Mr. Porat to remain on bond pending final disposition of his appeal with travel restricted to the U.S. and Israel.

The government filed a cross appeal.

On March 3, 1994 the Third Circuit affirmed the conviction but reversed the aspect of the sentence permitting house arrest in Israel. On April 14, 1994 a rehearing was denied.

STATEMENT OF THE FACTS

At the time the Government questioned Mr. Porat, on May 17, 1989, the Government had convicted and sentenced Colin Offenhartz (5 years incarceration), the president of Fraass, for conspiracy, antitrust and false statement violations. He agreed that he had, by letter, abrogated an alleged worldwide conspiracy agreement into which he had allegedly entered with Porat in 1979 (10 years before Porat testified). He made a "deal" with the Government and, among other things, received immunity for the obstruction of justice (shredding documents) and perjury committed at his trial.

Offenhartz claimed that Porat conferred with Anthony Siragusa, Offenhartz' partner, on collusive bidding in the U.S regarding military bandage contracts at Defense Personnel Support Center. By then, Mr. Siragusa was dead. Even with this information and despite years of previous investigation, no indictment or charge was ever brought against Mr. Porat for an antitrust violation. The grand jury heard much evidence that no such arrangement existed.

Offenhartz further claimed in his grand jury testimony and in his trial testimony that he gave Porat a certain check, which check was in payment for information on an Israeli contract with the Israeli Government. He testified that the check was negotiated through a coded Swiss bank account. Offenhartz testified that this payrnent was for a contract he obtained with the State of Israel, after Porat allegedly told him the price. This event, if believed, as told by Offenhartz, was an internal and domestic matter for the State of Israel. It had nothing to do with bidding on U.S. Military bandage contracts, and therefore not material to the grand jury investigation.

Offenhartz did not like Porat and was angry at him. Among other things, he did not like that I.M. was in the United States, that he and Porat were competitors, or the protests lodged by I.M and directed at him.

In addition to the plea agreement, the government assisted in obtaining the earliest parole for Offenhartz, requested a prison transfer for him, and after his release, requested of his parole officer that he be granted permission to travel internationally to a business conference in Europe.

There was much evidence before the grand jury that no antitrust violations existed. Bernard Laderman, then Vice President of I.M., Inc., testified that no such bid rigging arrangement existed. Offenhartz agreed. Given the small office, the employees would have to have known, if any bidrigging arrangement existed.

In effect the question of an agreement to violate the antitrust law in bids with DPSC on the 1983-86 military bandage contract became no more than the word of Offenhartz based on the hearsay statements of the deceased Siragusa. During the relevant period I.M.'s bid prices were continually falling

and it ultimately won contracts, it protested against Fraass unfair competition to the DPSC, made claims against Fraass and conducted itself as a competitor.

In a pretrial hearing, the government sought to introduce evidence of the "background" of the $200,000 check. The background of the check is not the background of the offense, which in this case was an alleged false statement to a grand jury. The government wished to introduce evidence of a worldwide conspiracy to violate the antitrust laws. It sought to introduce evidence that Offenhartz and Porat allegedly agreed not to bid in each other's native market. Offenhartz, an American, living in the U.S., was not to bid in Israel and Porat, an Israeli then living in Israel, was not to bid in the U.S. It was unlike the alleged conspiracy the grand jury was investigating, i.e. companies engaged in collusive bid rigging on the same contracts. At the pretrial hearing argument, the government did not advise the court that their evidence would comprise evidence dating to 1977, 1978 and 1979 of this purported agreement. The court in the absence of this information, and in the absence of information that there were substantial other lawful

reasons why these two businessmen did not bid in each other's markets, and in the further absence of the information that the government was aware of substantial written repudiations of any such agreement, ruled that such evidence was admissible. The court stated that its prejudicial value did not outweigh its probative effect. However, the court did not articulate its reasoning. Significantly, at trial there was no evidence of any communication between the parties after the repudiation of the purported "worldwide agreement". It is not until four (4) years later, in November 1983, after I.M. was in the U.S. for two years, and after it made it's first bid on a U.S. contract, that Offenhartz asked Siragusa to call Amir Porat. Offenhartz admits there was no communication or colluded bid on this November 1983 bid. If there was an agreement, why was there no communication prior to this bid? If there was an agreement why was there no evidence of any communication between 1979-1983? In addition, Offenhartz acknowledged that I.M. could not obtain the Israeli contract because the Israelis viewed I.M. as an Israeli company and the contract had to go to an American company.

Offenhartz further testified he made his first offer ($2.19) to the Israeli's without prior consultation with Amir Porat. Offenhartz testified he did not do business with the Israeli's because they had been "very unpleasant". He had not done business with the Israeli's since the "mid-70's". Obviously, the mid-70's was well prior to the purported "worldwide conspiracy".

The government additionally sought to introduce a second grouping of other crimes evidence of a purported bidrigging agreement in the U.S. regarding bids at the DPSC. However, with regard to the other crimes evidence concerning the DPSC bids, the court did not rule that its probative value outweighed its prejudicial effect as required by F.R.E. 403 nor did it provide a reasoned basis.

Porat, in the face of this antitrust evidence[1] , defended the charge on trial by asserting that Offenhartz was not credible[2] and that Offenhartz had not given him the check in issue. (Count One, the jury

[1] Petitioner after having his pretrial and trial objections overruled regarding this antitrust and other crimes evidence was compelled to rebut it.

[2] It should be noted that Offenhartz on the morning of October 21, 1992, prior to retaking the witness stand, engaged in a private communication with one of the jurors. His lack of candor was evident.

hung.) He further asserted that the Swiss bank account was secretly opened without his knowledge, but in his name, by his brother, Michael Porat. Amir Porat attempted to show that his brother Michael (Micki) did this because Israeli citizens who are residents of Israel are not permitted to have out-of-country bank accounts. Amir Porat was then a resident in the U.S. The court did not permit Mr. Porat to prove this important information through his investigator.

In the grand jury, Porat agreed to sign a release and consent to permit the U.S. authorities to obtain any Swiss banking documents. The government's request required the signature of Amir Porat's brother, Michael Porat, as well. Yael Azoulay testified that Amir Porat and Michael Porat had a good relationship until the middle of 1989. The "turning point" came when Amir Porat wanted Michael Porat to sign the consent release forms and Michael Porat refused. This resulted in breaking up their lifelong partnership. Dr. Avi Porat, testified to the irreconcilable breakup. He testified that there was this severe disagreement between the two other brothers which resulted in an arbitration in October 1989.

The government called Sturzinger, an employee of the bank in New York who previously worked in Switzerland but not in the branch or city where the account was located (Zurich). Porat introduced evidence that a Swiss account could be opened in the name of another person and without their knowledge. While a prosecution witness, Sturzinger a banking official suggested one would have to provide sufficient identification, such as a passport, to open an account, he later admitted that if a person was known to the banking officials, or banking officials in an associated bank in another country, then that might not be necessary. Mr. Porat, acting pro se, conceded in his opening statement that the signatures on the accounts were his, not contesting that issue.

Porat presented an unrebutted fingerprint expert, who testified that fingerprints could be detected in 1989 from a touching of a check in 1984. Offenhartz testified he gave the check directly to Mr. Porat and that it was not in an envelope.

Mr. Porat sought to present character testimony through Bernard Laderman. The trial court did not permit the admission of such evidence.

REASONS FOR GRANTING THE WRIT

1. PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS, CONFRONTATION AND JURY TRIAL WERE VIOLATED WHERE AN ESSENTIAL ELEMENT OF THE OFFENSE, "MATERIALITY", WAS NOT SUBMITTED TO THE JURY VIOLATING IN RE WINSHIP AND ITS PROGENY

There exists an irreconcilable inter circuit split of authority on the fundamental question of whether the element of materiality is a question of fact that must be determined by a jury. The instant case presents this ripe issue for resolution.[3]

Recently the Ninth Circuit Court of Appeals held that the element of materiality in 18 U.S.C. §1001 is a question of fact that must be determined by the jury. U.S. v. Gaudin, 1994 WL 271930 (9th Cir. June 21, 1994).

In Gaudin, the Ninth Circuit recognized, as did Petitioner in the District Court and Third Circuit, that most cases continue to hold that materiality is a question of law for the court, relying on dicta in Sinclair v. United States, 279 U.S. 263 (1929), without discussing the impact of In Re Winship,397 U.S. 358,

[3] Porat raised this issue pre-trial and it was denied. A jury instruction was submitted and objection interposed.

90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Petitioner relied upon U.S. v. Taylor, 693 F.Supp. 820, 830-47, (N.D. Cal. 1988) and N.J. v. Anderson, 603 A.2d 928 (N.J. 1992), as did the Ninth Circuit in Gaudin. Also see, Commonwealth v. McDuffee, 398 N.J. 2d 463, 469-70); People v. Hedgecock, 795 P.2d 60 (Cal. 1990) The Third Circuit in U.S. v. Slawik, 548 F.2d 75, (3rd Cir. 1977) (holding materiality is an essential element of the offense in a 18 U.S.C. 1623, perjury prosecution, but is a matter of law and does not have to be submitted to the jury) and U.S. v. Greber, 760 F.2d 68 (3rd Cir. 1985) (holding materiality is an essential element of a 18 U.S.C. 1001, false statement protection but does not have to be submitted to the jury) built on U.S. v. Sinclair, rather than In Re Winship, which it is submitted controls, as was done in U.S. v. Gaudin, supra, U.S. v. Taylor, supra, and State v. Anderson, supra.

The Supreme Court stated, in the oft-quoted opinion of In re Winship, 397 U.S. 358, 364 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof [to a proper factfinder] beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged.

This imperative is further compelled by later developments by the Supreme Court. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 520-21 (1979); Cabana v. Bullock, 474 U.S. 376, 384-85 (1986); Carella v. California, 491 U.S. 263, 268-69 (1989) (Scalia, J., concurring); Yates v. Evatt, 500 U.S. ----, ---- , 111 S. Ct. 1884, 1891 (1991); Sullivan v. Louisiana, 113 S.Ct. 2078, 2082 (1993). It is clear from this authority that under the Sixth Amendment the proper factfinder in serious criminal offenses is the jury. The Court in Cabana stated:

A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, Duncan v. Louisiana, 391 U.S. 745 S.Ct. 1444, 20 L.Ed 2d. 491 (1968) and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, Sandstrom v. Montana, 442 U.S. 510 (1979). Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. Cabana, 474 U.S. at 384-85 (citation omitted).

In Sullivan, the Court stated:

The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. .

. . .' In Duncan v. Louisiana, 391 U.S. 145, 149 (1968), we found this right to trial by jury in serious criminal cases to be 'fundamental to the American scheme of justice,' and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' (citations omitted) Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. (citations omitted)

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. (cases omitted.) The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements. (citations omitted)

The quoted summary in Sullivan makes clear that the jury must decide 'the facts necessary to establish each [element of the crime].' Justice Scalia has noted in his concurrence in Carella, the jury's fact-finding function is a structural matter that the Constitution guarantees.

The constitutional right to a jury trial embodies 'a profound judgment about the way in which law should be enforced and justice administered.' It is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of

judges.' A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.
Carella, 491 U.S. at 268 (citations omitted).

Most other circuits have held that the determination of materiality in criminal perjury and false statement statutes is a question of law for determination by the judge. The Ninth Circuit has held that the issue of materiality in most of these statutes is a question of law for the judge. The Ninth Circuit is at variance with other Circuits regarding section 1001 cases, holding that materiality it is an element of the crime that must be determined by the jury. United States v. Valdez, 594 F.2d 725, 728-29 (9th Cir. 1979).

The opinions holding that the issue of materiality in these criminal cases is a matter of law for the court to decide have relied on the 1929 Supreme Court case of Sinclair v. United States, 279 U.S. 263 (1929), which involved a congressional investigation into the Teapot Dome Scandal. The defendant was charged with a violation of 18 U.S.C. §192 for failing

to answer a question that was "pertinent to the question under inquiry." The Court held that the issue of pertinency was akin to determining relevance in the admission of evidence in a trial and therefore was a matter of law reserved for the court. Id. at 298 But the critical, and fundamental, essential and threshold issue remains: Whether the opinions relying on Sinclair survive the more recent holdings of the Supreme Court that the Sixth Amendment and the Due Process Clause require that the facts essential to establish the elements of a crime must be decided by a jury?

Moreover, as the government pointed out to the Third Circuit, Sinclair v. U.S., 279 U.S. 263, 298, 49 S.Ct. 268, 273, 763 L.Ed. 692, 700 (1929) is no more than dictum in Kungys v. U.S., 485 U.S. 759, 772, 108 S.Ct. 1537, 1547, 99 L.Ed. 2d 839, 854 (1988), and furthermore does not squarely answer this question.

The Supreme Court of New Jersey cogently explained the inapplicability of Kungys and Sinclair, as did the Court of Appeals in Gaudin, supra.

. . .We note that the statute at issue there, [Kungys,] does not provide for a trial by jury, Luria v. United States, 231 U.S. 9, 27-28, 34 S.Ct. 10, 15, 58 L.Ed. 101, 107 (1913); consequently, the issue would be

resolved by the court no matter how characterized. Although the Court in Kungys requested additional briefs on whether materiality is a question of law or fact, its focus was on the proper scope of review. 485 U.S. at 772, 108 S.Ct. at 1547, 99 L.Ed.2d at 854. The Court saw 'no reason not to follow what has been done with the materiality requirement under other statutes.' ibid., primarily because there was no occasion to address either the constitutional jury-right issue or the related due-process issue. We are not convinced that should the Supreme Court squarely address the issue, it would find the rule of Sinclair reconcilable with its construction of the fundamental right to a trial by jury.

In Gaudin, the court recognized that Kungys involved the denaturalization of a citizen, in a civil, non-jury proceeding. The Kungys court, in the process of reviewing the materiality decision, stated that it must first decide whether the determination of the materiality of the false statement of the date and place of birth should be reviewed as a question of law or a question of fact. Kungys, 485 U.S. at 772. In effect, the Court was determining the appropriate standard of review of the district court's decision in this civil case. The Gaudin court found it inconceivable that the Supreme Court in Kungys intended to resolve the constitutional questions explicit in a criminal case (i.e. 5th and 6th Amendments, proof of every essential

element beyond a reasonable doubt by a jury, and due process) through Sullivan in a civil non-jury case without ever mentioning the Winship line of cases.

The Court's opinion in stating the test for determining materiality that the false statement be one that 'has a natural tendency to influence or was capable of influencing, the decision of the decisionmaking body,' noted that this involves a factual determination. The opinion states '[t]his test must be met, of course, by evidence that is clear, unequivocal, and convincing.' Kungys, 485 U.S. at 772 (emphasis added). The judge may be free to evaluate this evidence in order to make that determination in a civil case, but this is not true in a criminal case. In a criminal case, the test must be met by evidence that establishes materiality beyond a reasonable doubt. Justice Scalia also explains the reason for remanding certain of the alleged misrepresentations stating, 'it is not our normal practice to consider fact-bound legal consequences of contested district court findings not yet reviewed by the court of appeals.' Id. at 773 n. 6 (emphasis added). In a criminal case, Sullivan would require

that these findings of fact be made by a jury.

Both the tenets of due process and the right to a jury trial mandate that materiality, as an element of the offense of false statements to a grand jury, must be found beyond a reasonable doubt by the jury. The United States Supreme Court has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute them with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 366, 375 (1970); accord Cage v. Louisiana, 498 U.S.___, ___, 111 S.Ct. 328, 329, 112 L.Ed. 2d 339, 341 (1990) (quoting Winship); Carella v. California, 491 U.S. 263, 265, 109 S.Ct. 2419, 2420, 105 L.Ed.2d 218, 221 (1989) ("The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense.") State v. Anderson, 127 N.J. at 200-01.

How could so many have been so wrong for so long? Explained in Anderson, the answer reveals:

(1) First, the early cases erroneously equated materiality for purposes of the perjury statute with

materiality as a preliminary determination on the admissibility of evidence.

(2) Second, the rule that characterized materiality in perjury cases as a question of law became well established as later opinions cited the early cases, apparently with little or no independent analysis. Thus, the allocation to the court of the determination of materiality became firmly entrenched in the law without having been subjected to detailed scrutiny or having been harmonized with the requirements of due process and the right to a jury trial. 127 N.J. 204-05.

(3) Finally, faced with the seemingly overwhelming precedent, most courts have declined to reexamine the validity and soundness of the rule in light of more recent cases emphasizing the right of an accused to have the jury find all elements of a crime beyond a reasonable doubt. [Id. at 1166 (citations and footnote omitted).] 127 N.J. 205-06.

The right to a jury trial is perhaps more fundamental than any other right. It reflects the conscience and responsibility of the community and embodies the common sense and feelings of society in general. A defendant ordinarily maintains the right to have the same trier of fact decide all issues of fact.

The dissent in Gaudin, notes Gaudin is in conflict with all other federal circuits, and further recognizes the importance of the decision because if materiality is a question of fact in 18 U.S.C. §1001 prosecutions, then it is a question of fact in other

prosecutions involving materiality.

In re Winship, and its progeny, the Fifth Amendment due process clause, the Sixth Amendment right to a jury trial and the fundamental precept in criminal cases that every essential element be proven beyond a reasonable doubt to the jury compels reversal in this case.

2. PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED WHERE THE GOVERNMENT FAILED TO PROVE THE ESSENTIAL ELEMENT, MATERIALITY, BEYOND A REASONABLE DOUBT.

Section 1623 of Title 18 proscribes "false material declarations" made before a grand jury, and, by its express terms, the statute is violated only when the perjury is committed in response to a question which bears upon the matters within the investigation's purview. The government must prove this nexus. It is clear in the Third Circuit that materiality is an element that must be proven beyond a reasonable doubt. in U.S. v. Slawik, 548 F.2d 75, 79 (3d. Cir. 1977) The government has clearly failed to prove this element.

"The test for determining materiality is whether

the allegedly perjurious statement tends to impede or hamper the course of the investigation by the grand jury." U.S. v. Bednar, 728 F.2d at 1047. The appropriate way to analyze materiality was set forth in two prongs in U.S. v. Brimberry, 779 F.2d 1339, 1349 (8th Cir. 1985):

> "The first matter to examine is the scope of the grand jury investigation." ..
>
> "The second matter to examine is how the false testimony may have impeded the grand jury's investigation."

As to this first prong, the government failed to prove the scope of the grand jury investigation before which Mr. Porat testified. Porat squarely raised this matter at the conclusion of the government's case.

At no time, however, did the government, at trial, prove the particular nature or scope of the grand jury before which Mr. Porat testified. Moreover, in fact, the government never proved that the grand jury in which Mr. Porat testified is the same grand jury alleged in the indictment.

As to the second prong, it is argued infra that it was not material to any grand jury investigation whether or not Mr. Porat had a bank account (Count

Two), (or received a check - Count One), particularly where the check was allegedly given as a commission in relation to an Israeli contract in the State of Israel; and the question regarding a bank account would be even less material.

Moreover, the governrnent's attempt to alter this fundamental requirement in requesting a pretrial determination of materiality was denied by the court. The Court stated, "I decline to do so until I've heard the government's evidence." This was an effort to undermine Petitioner's Fifth and Sixth Amendment rights, to due process, a fair jury trial, and confront and cross-examine his accusers. Having lost their motion, the government sought to rely on its pre-trial Motion for Determination of Materiality and Exhibits thereto, to support their argument to affirm the conviction in the Court of Appeals. The government not only wishes to deny Petitioner his right to a jury trial, supra, but seeks to deny him the opportunity to challenge, confront and cross-examine the government's evidence. This evisceration of fundamental rights is dangerous to the basic concept that all essential elements must be proven at trial, after the opportunity to confront and

cross-examine is provided. Nothing less will suffice.

The government has failed to prove that the grand jury before which Mr. Porat testified was the same grand jury conducting the investigation of bids submitted between 1983 and 1986 on certain military bandage contracts awarded by the Defense Personnel Support Center of the Defense Logistics Agency of the Department of Defense (DPSC).

In virtually every false declaration prosecution the government proves this essential element by calling to testify at trial the grand jury foreperson, another grand juror, or the assistant U.S. attorney in charge of the investigation and grand jury. See, U.S. v. Pearce, 428 F. Supp. 1328, 1332 (E.D. Pa. 1977) (" the foreman of the grand jury, testified") (emphasis supplied); U.S. v. Brumley, 560 F.2d 1268 at 1278 (5th Cir. 1977) (" the United States Attorney in his testimony . . . .") (emphasis supplied); U.S. v. Doulin, 538 F.2d 466, 470 (2d Cir. 1976) (". . the testimony of one member of each of the grand juries involved,") (emphasis supplied); U.S. v. Goguen,723 F.2d 1012, 1019 (1st Cir. 1983) "the grand jury foreman testified as to materiality" (emphasis supplied); U.S. v.

Lasater,535 F.2d 1041, 1046 (8th Cir. 1976) (The case agent and the assistant U.S. attorney testified") (emphasis supplied)

In all cases, the relevant witness testified at trial and was subject to cross-examination. It was just this that the government sought to avoid. It was argued that there was great concern that such a person would admit that the information sought was not material to the purported matter under investigation. A review of the insufficiency of the second prong answers the questions posed as to the first prong.

The grand jury testimony was clear that the $200,000 check was a commission to Amir Porat in return for his supplying the price to bid in Israel for this Israeli contract. Offenhartz stated it represented a 40 cent commission for each of the 500,000 bandages ordered. In knowing what to bid, Offenhartz was able to make as much money as he could and be assured he would obtain the contract. The Israeli's still desired to get the best price they could. His initial offer was $2.19 but, after consultation, it later became $1.59. Moreover, this contract was of a sort on which Porat was unable to bid. As the Israeli government made

clear the contract had to go to an American company and the Israeli's perceived I.M. as the same as Pollack of Israel. This was not material to the grand jury and would not be sufficient to prove beyond a reasonable doubt the offenses charged.

If anything, this was an independent, one time attempt at providing a price and securing a contract. This was a unique, separate and distinct venture. In fact, this was not even a "bid." Offenhartz had not conducted business for years in the State of Israel, since the mid-70's.

This provided an opportunity to determine ahead of time the best price to offer, if one believes Offenhartz. This was unlike the purported U.S. bidrigging scheme where allegedly prices to bid were determined beforehand by the "competitors" and then the competitors each submitted "secret bids." Here there was no bidding as such, no other company was involved, but rather the contract was given to Fraass after Fraass through Offenhartz made an offer which was determined by the Israeli's to be acceptable. It was a negotiated contract between Fraass and the Israeli's. In fact he reduced his price 69 cents.

The district court relied upon three factors in determining that the scope of the grand jury was properly proven. Those three points were: (1) the grand jury transcript of Porat on May 7, 1989; (2) the testimony of Kimberly Pepper, the grand jury court reporter; and (3) the testimony of Colin Offenhartz. (District court did not review the second prong, that the check was in relationship to an Israeli contract.)

However, after an an examination of the May 17, 1989 transcript, Pepper's testimony and Offenhartz' testimony at trial reveal that the scope of the grand jury wherein Porat testified was never proven. Pepper testified that her transcription was accurate. She did not testify to the matters under investigation.

An individual cannot be convicted unless the Government demonstrates that the alleged perjurious statements were material to the proceeding at which they were made. See U.S. v. Crocket, 568 F.2d 1049 (3rd Cir. 1977); U.S. v. Slawik, 548 F.2d 75 (3rd Cir. 1977). The alleged payment was in relation to a non-bid contract made by Fraass in Israel, not the United States. The Government, again by the terms of its indictment, investigated reported collusive bidding on

U.S. military bandage contracts awarded by the Defense Personnel Support Center of the Defense Logistics Agency of the Department of Defense of the United States Government. Similarly, on the same basis, as to the second count, it would not be material whether or not Porat had a Swiss account.

It is not material to the grand jury to determine Amir Porat's relation to Fraass regarding whether he had a Swiss bank account, where the grand jury is purportedly investigating bid rigging on U.S. Military bandage contracts awarded by the U.S. Department of Defense between 1983-1986.

3. THE DISTRICT COURT ACTED WITHIN THE TIME HONORED INHERENT, HISTORICAL, AND STATUTORY BROAD DISCRETION IN SENTENCING PETITIONER TO SERVE THE HOME DETENTION PORTION OF HIS SENTENCE IN ISRAEL

In a case of first impression, this issue reaches the critically important question of the inherent, historical, and statutory broad discretionary authority of the district court to impose reasonable condition upon supervised release sentences. There appears as well to be a split between the Third Circuit and Tenth Circuit, the only two circuits that have reviewed the

issue.

Today, there are ever increasing numbers of foreign nationals that are convicted of crimes in the U.S. and at the same time a severe shortage of prison facilities and bed space. In addition, as the world gets smaller, U.S. citizens find themselves more often living and working in foreign countries.

The home confinement portion of the supervised release aspect of Porat's sentence as imposed by the district court was lawful; wholly within the discretion of the trial court to require Petitioner to serve it in Israel.

The "split sentence" provision of §5C1.1 states:

> If the applicable guideline range is in zone C of the sentencing table, the minimum term may be satisfied by --
>
> (1) a sentence of imprisonment; or
> (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one half of the minimum term is satisfied by imprisonment.

It is not unlike a split sentence under the old law of 18 U.S.C. 3651, where the Court was provided the flexibility in sentencing when there was only <u>one</u>

count of conviction to impose a period of incarceration followed by a period of probation.

In the government's attempt to label this aspect of the specified condition of supervised release of home confinement an unlawful sentence, it proceeds upon a misconception. The government argued, "There is no statute or rule authorizing such a sentence." To the contrary, there is no statute or rule that specifically prohibits the Court from imposing any number of conditions attached to supervised release and/or probation. Rather, there exists statutory and case law authority for exactly what the court did. Further the rule of lenity acts in Petitioner's favor.

There are two possible options: The first is a straight sentence of imprisonment §5C1.1b(1), and the second allows the court to split the sentence so that one portion of the sentence is fulfilled by imprisonment and the other portion by a term of supervised release with a condition that substitutes community confinement or home detention for the balance. The closing phrase, "...at least one half of the minimum term is satisfied by imprisonment" recognizes that, in fact, only one half must be imprisonment. It is clear from the

application notes that the aspect of the supervised release is not a term of imprisonment but rather is a substitute for imprisonment. The guidelines provide that home detention may be imposed as a condition of probation or supervised release. §5F1.2. The application notes recognize that the Court (1) may impose other conditions of probation or supervised release appropriate to effectuate home detention;and that it is not required that electronic monitoring be utilized in order to monitor the defendant in connection with home detention. §5F1.2, application note 1,2.

§5B1.3 of the sentencing guidelines describes the variety of possible conditions of probation. §5B1.4 identifies the recommended conditions of probation and supervised release which appear as a policy statement. 18 U.S.C. 3563 reviews the wide variety of conditions of probation that may be imposed by a court, both mandatory and discretionary. §18 U.S.C. 3583 recognizes these factors and conditions as varied as they may be for supervised release.

. . . .The court may order, as a further condition of supervised release, to the extent that such condition --

> (1) is reasonably elated to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C),

> and (a)(2)(D);
> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
> (3)is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.

The Third Circuit Court of Appeals essentially rewrote the statutory framework of supervised release, and did so because it perceived, without Porat's opportunity to make a factual record in the lower court, by stating that "we do not see" and "It is not clear" how probation department would maintain oversight and ensure compliance with the sentence. The statutory framework overlooked by the Third Circuit reveals, as the district court recognized by its sentence, that the district court does not have to require the defendant to remain within the jurisdiction of the court 18 U.S.C. 3563 (b)(15), report to a probation officer 18 U.S.C. 3563 (b)(16), require a probation officer to visit him 18 U.S.C. 3563 (b)(17), or in requiring the defendant to remain at this place of residence during non-working

hours to be electronically monitored 18 U.S.C. 3563 (b)(20).

There is authority for a district court to order an alien who has been sentenced to supervised release to be deported and remain outside of the United States. 18 U.S.C. §3583 (d). If a court can order an individual on supervised release to remain outside the United States, it necessarily follows that the Court can require that individual to abide by conditions of supervised release, including that of home confinement while outside of the United States.

18 U.S.C.§3586, makes clear that "the implementation of the sentence of imprisonment is governed by the provisions of Subchapter C of Chapter 229 [18 U.S.C. Section 3621 et seq.] and, if the sentence includes a term of supervised release, by the provisions of Subchapter A of Chapter 229 [18 U.S.C. Section 3601 et seq.].

Section 18 U.S.C. 3601, Supervision of probation states:

A person who has been sentenced to probation pursuant to the provisions of Subchapter B of Chapter 227 [18 U.S.C. 3561 et seq], or placed on probation pursuant to the provisions of Chapter 403 [18 U.S.C. Section 5031 et seq], or placed on supervised release pursuant to the provisions of Section 3583 [18 U.S.C.

Section 3583], shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court. (emphasis supplied)

Conditions of supervised release, as ordered by the district court, are reviewed for abuse of discretion.[4] See U.S. v. Pugliese, 960 F.2d, 913, 914 (10th Cir. 1992). The Third Circuit overstepped its appellate function, since the sentence was lawful and the district court did not abuse its discretion. The court of appeals in Pugliese recognized that Pugliese had in the district court "attached to his reply brief a copy of a purported order of another court allowing a person on supervised release to live abroad" (960 F. 2d at 915), and while denying relief to Pugliese, the court still recognized, "We see in the law, however, no direct impediment to authorizing a person on supervised release to leave

[4] "This standard of review is echoed in cases concerning conditions of probation, both in statutes and in the sentencing guidelines, provisions for conditions of supervised release are cross-referenced with provisions for conditions of probation. See 18 U.S.C. §3563(b) (probation)), U.S.S.G. §5D1.3 (supervised release) (referring to U.S.S.G. §5B1.4, p.s. (probation)). Thus, cases interpreting issues concerning conditions of probation provide standards for issues related to conditions of supervised release. U.S. v. Jalilian, 896 F.2d 447, 448 (10th Cir. 1990) (legality of discretion); and United States v. Hussong, 778 F.1d 567, 589-70 (10th Cir. 1985) ('a sentencing judge has broad discretion to impose conditions of probation reasonably related to protecting the public and rehabilitating the defendant')". U.S. v. Pugliese, 960 F.2d 913, 915 f.n.3.

the United States, if the supervision the judge believed is necessary can be enforced abroad." Id. at 915.

The Court in Pugliese wrote:

District courts have wide latitude to determine the extent of geographic restrictions as conditions of supervised release. See 18 U.S.C. §3563(b)(14) ('The court may provide, as further conditions of a sentence of probation. . . that the defendant reside in a specified place or area, or refrain from residing in a specified place or area.'); 18 U.S.C. §3563(d) (including the provision of §3563(b)(14), among others, as a discretionary condition of supervised release); U.S.S.G. §5B1.4(a)(1), p.s. ('defendant shall not leave the judicial district **or other specified geographic area without the permission of the court or probation officer;'** implying that permission for other geographic assignments is possible if appropriate for the defendant's individual circumstance) (emphasis in the original). 960 F. 2d at 915

It is clear that a district court:

may impose other conditions of supervised release to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and character reference of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational vocational training, medical care of the correctional treatment in the most effective manner. See 18 U.S.C. 3553(A)(2) and 3583(D).

As such, the district court was wholly within its

discretion in permitting Mr. Porat to serve the supervised release portion of his sentence in home confinement in Israel. The government has not met its burden of proving abuse of discretion. See U.S. v. Polchlopek, 897 F.2d 997, 998 (9th Cir. 1990) (Courts have broad discretion in setting conditions of probation).

The government is either aware or should be aware that the Probation Department for the Eastern District of Pennsylvania made arrangements with an American company to electronically monitor the home detention of Porat in Israel. Furthermore, the government is certainly aware that Mr. Porat has fully and completely complied with all terms and conditions in his reporting while on bail.

In addition, while certainly unnecessary, the trial court could require, and Porat would not object, to the continuation of his bail and/or any other appropriate order that would keep in place his substantial bail until his sentence, including that portion of home confinement, was fulfilled. Should a violation occur it would result in the forfeiture of the substantial bail and posted property. As well, in

connection with Mr. Porat's bail, he filed pleadings in which he waived any right to contest extradition either in Israel or anywhere else in the world. Further, the district court is capable of determining all of the appropriate conditions of home confinement, including when, how, and where it would be served.

As with any split sentence, for any person, regardless of nationality or residence, the Bureau of Prisons is empowered to determine the place of designation for that portion of the sentence that includes imprisonment. Thereafter, the Bureau of Prisons will play no function with respect to the aspect of supervised release. The statute cited by the government, 18 U.S.C. 3621, recognizes that a person who has been sentenced to a term of imprisonment "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed." After the first 5 months imprisonment, the Bureau of Prisons no longer maintains custody over the individual.

As the home detention portion of a split sentence is not a sentence of incarceration for an American, it cannot be one for a foreign national.

4. PETITIONER WAS DENIED A FAIR TRIAL WHEN IRRELEVANT OVERLY PREJUDICIAL AND UNRELIABLE HEARSAY "OTHER CRIMES" EVIDENCE IN THE NATURE OF ANTITRUST VIOLATIONS WAS ADMITTED AND WHERE PETITIONER WAS DENIED THE OPPORTUNITY TO PROVE HIS GOOD CHARACTER IN VIOLATION OF MICHELSON V. UNITED STATES.

Petitioner contends that the District Court erred when it admitted evidence of alleged antitrust violations, since such prior acts were too remote in time, inconclusive, confusing, prejudicial, unreliable, based on unsubstantiated hearsay statements, unfairly impugned the character of Petitioner, and unfairly altered the focus of the trial from the crime charged.[5]

The "other crimes evidence" came in two regards. One, the government sought to prove a purported "worldwide conspiracy to violate antitrust laws" where the parties, Offenhartz and Petitioner, allegedly agreed not to bid in eithers native market. Essentially, Offenhartz, an American was not to bid in Israel, and, Porat, an Israeli, was not to bid in the United States. However, this "evidence" was premised

[5] The government offered U.S. v. Williford, 764 F.2d 1493 (11th Cir. 1985).Petitioner offered U.S. v. Roenigk, 810 F.2d 809 (8th Cir. 1987), a case, as here, where the defendant was charged with violation of 18 U.S.C. §1623.

upon an admitted perjurer, Colin Offenhartz, where Offenhartz had repudiated any such "agreement" before it started. The "agreement" allegedly was not proximate in time, but in 1977-1979. Each of the respective parties had their own important reasons for not venturing into the other's native market. Offenhartz had historic problems with the Israelis. In addition, he was involved on defense contracts with the U.S. government where most of the world market existed. Offenhartz, by his own admission, had 90% of the world market which was based in the United States. At the time of this alleged agreement, Porat's company, I.M. did not exist. Pollack, an Israeli company then existed, of which Porat was a principal but was legally unable to bid in the United States due to the Barry Amendment and the Buy American Act.

The second grouping of other crimes evidence, was with regard to U.S. bids. However, this "other crimes" evidence was, completely unreliable. Per Offenhartz, all conversations regarding the U.S. bidrigging for prices was between Porat and

Offenhartz' deceased partner, Siragusa.[6] These alleged discussions should not have been admitted into evidence because it was not shown that Siragusa was a co-conspirator, the only evidence of a relationship between I.M. and Fraass comes from the mouth of Colin Offenhartz, and therefore anything said by Siragusa is hearsay.

The only evidence of the "discussions" is the unadorned statement of Colin Offenhartz: such evidence is not enough to permit a conclusion by a preponderance of the evidence that the discussions took place, that they were coconspirators,` and not enough to permit the introduction of the evidence.

This presents the question left open in Boujaily that:

> We need not decide in this case whether the courts below could have relied solely upon Lonardo's hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. Boujaily v. U.S., 483 U.S. 171, at 181. (emphasis

[6] The government strenuously argued this other crimes evidence in closing that Petitioner committed antitrust violations involving "six different camouflage bandage contracts. And for each and every one of those contracts, ladies and gentlemen, Tony Siragusa, provided the defendant with the price to bid or the price to bid above and on each and every one of those contract, ladies and gentlemen, the defendant did just as he was asked. He lived up to his part of the deal and submitted high bids on behalf of Fraass."

supplied)

Fundamentally, [t]here must be evidence that there was a conspiracy involving the declarant and the non-offering party, and that the statement was made "during the course and in furtherance of the conspiracy." Bourjaily v. U.S., 483 U.S. at 175.

While the government was painting the Petitioner a "bad person", the district court denied Petitioner the opportunity to present evidence of his good character in violation of Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed 168 (1948). Character evidence is so important, it can, in its own right, create reasonable doubt. Michelson v. United States, supra., U.S. v. Logan, 717 F.2d 84 (3rd. Cir. 1983). Petitioner was prepared to lay the proper foundation, but the court denied the admission because the character witness despite speaking to those in the community that knew Porat in English, did not speak Hebrew himself.[7]

Notwithstanding Huddleston v. United States,

[7] Petitioner was prepared to prove the character witness knew Petitioner, knew others that knew Petitioner, and had occasion to discuss his reputation for honesty, truthfulness, and for being a law abiding person with those other individuals and report that he held such good reputation.

485 U.S. 681, 108 S.Ct. 1496, (1988), there remains significant inter and intra circuit confusion on substantive issues which dramatically affect the use of "other crimes" evidence. Guidance provided by Huddleston, supra, recognized, that the other acts evidence must 1) have a proper purpose, (2) be relevant, (3) be more probative than prejudicial, and (4) be later accompanied with a limiting instruction.

There remains a split by the different Circuits' interpretation and standard for admission of "other crimes evidence"; further, once admitted, there is a split amongst the Circuits concerning the standard of review of the district courts' decision ("clear abuse of discretion"; "substantial error", and yet others apply a de novo standard of review") and last, the Third Circuit, unlike others, recently requires the district court to articulate its' reasoning for the admission.

For example, distinguished from the First, United States v. Carty, 993 F. 2d 1005, 1011 (1st 1993); Second, United States v. Gordon, 987 F.2d 902, 908 (2nd Cir. 1993); and Fifth Circuits', United States v. Ridlehuber, 11 Fed. 3rd 516, 522 (5th Cir. 1993), two-step review and the Third Circuit's, United States

v. Sampson, 980 F.2d 883, 886 (3rd Cir. 1992) four-step review, the Fourth Circuit applies a three-part test to implement Rule 404(b) which allows admission if the evidence is "1) relevant to an issue other than character, 2) necessary and 3) reliable. United States v. Sparks, 1994 WL 177450 (4th Cir. 1994). Then proceeds to the balancing test. Unites States v. McMillon, 14 F. 3rd 948 (4th Cir. 1994).

The Seventh Circuit, as well, is concerned that the evidence shows the other act is similar enough and close enough in time and that the evidence is sufficient to support a jury finding of the other act. United States v. Flores, 5 Fed. 3rd 1070, 1080 (7th Cir. 1993). The NInth Circuit similarly is concerned that the other act is similar, not too remote in time and that the evidence is sufficient to support a finding that the other act was committed. United States v. Bradley, 5 Fed. 3rd 1317, 1320 (9th Cir. 1993).

The Third and Ninth Circuits distinguish themselves by requiring a requisite logical connection. The NInth Circuit requires, the government to "articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the

other acts evidence." United States v. Mayans, No. 92-50530, Slip Op. 1603, 1616 (9th Cir. Feb. 9, 1994) quoting United States v. Mehremanesh, 689 F.2d 822, 830 (9th Cir. 1982). The Third Circuit requires the court to "articulate reasons why the evidence also goes to something other than character". United States v. Sampson, supra; Gov't of the Virgin Islands v. Archibald, 987 F.2d 180 (3rd. Cir. 1993).

Most Circuits review for abuse of discretion, it appears the Sixth Circuit first reviews whether the prior acts occurred pursuant to clear error, United States v. Gessa, 971 F.2d 1257, 1261-62 (6th Cir. 1992), determine de novo if the prior acts are admissible under 404(b), and then abuse of discretion concerning the balancing test. United States v. Wright, 16 F. 3rd 1429 (6th Cir. 1994).

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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